88-1639

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

**IN THE MATTER OF THE ESTATE OF E. DAVIS WERNICK, Deceased.**

**MITCHELL C. MACKS,**

*Petitioner,*

v.

**SAMUEL WERNICK,**

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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## QUESTION PRESENTED

Whether a defendant in a state criminal contempt proceeding enjoys a due process right to a fair and impartial prosecution under the fifth and fourteenth amendments, which would prohibit the use of the lawyer for his opponent in underlying civil proceedings as the contempt prosecutor.

## LIST OF PARTIES

1. Mitchell C. Macks
2. Samuel Wernick
3. The Estate of E. Davis Wernick

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**MITCHELL C. MACKS,**

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v.

**SAMUEL WERNICK,**

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

The petitioner Mitchell C. Macks respectfully prays that a writ of certiorari issue to review the opinion of the Appellate Court of Illinois, First District entered on November 7, 1988.

## OPINIONS BELOW

The Appellate Court of Illinois for the First District entered its decision on November 7, 1988 which is set forth as Appendix A. The Supreme Court of Illinois denied leave to appeal on February 1, 1989. Appendix B.

## JURISDICTION

The Appellate Court of Illinois issued its decision November 7, 1988. The Supreme Court of Illinois denied petitioner's timely filed Petition for Leave to Appeal on February 1, 1989. Jurisdiction rests on 28 U.S.C. Section 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Petitioner, Mitchell C. Macks, is a 75 year-old lawyer. Although Mr. Macks is licensed to practice law in Illinois, he has spent virtually his entire career in the real estate profession and is the chairman of a Chicago bank. App. A-1.

Mr. Macks was the defendant in certain probate proceedings. Ill. S. Ct. No. 64779. The contempt at issue arose in connection with those probate proceedings. The firm of Becker & Tennenbaum has represented Mr. Macks' opponent, Respondent Samuel Wernick, in those proceedings and continues to do so today. App. A-1.

The Respondents instituted the probate citation proceedings against Mr. Macks in 1979. The probate court ultimately ruled in favor of the Respondents, but denied their requests for interest, litigation expenses and attorney fees, punitive damages, and sanctions. Cross-appeals were filed with the Appellate Court of Illinois, First Division. Mr. Macks submitted an appeal bond in the form of a letter of credit drawn against a bank.

In May of 1986, the letter of credit appeal bond was expiring and needed to be extended. The matter was a mere formality requiring evidence of the bank's agreement to the extension of the letter of credit. App. A-2.

At the instruction of personnel of the Cook County circuit clerk's office, Mr. Macks went to see the trial judge,

The Honorable Henry Budzinski, to find out what needed to be done to have the appeal bond extended. App. C-2. Judge Budzinski told Mr. Macks to leave with him the bank's agreement to the extension of the letter of credit. Judge Budzinski stated that he would talk to the attorneys involved in the matter and with that, the communication between Judge Budzinski and Mr. Macks ended. App. C-2.

In response to this communication, the Respondents filed a Petition for Rule to Show Cause why Mr. Macks should not be held in indirect criminal contempt. The proceeding was transferred from Judge Budzinski to Judge Benjamin Novoselsky, based upon Respondents' decision to call Judge Budzinski as a witness should a Rule to Show Cause issue. App. A-2. Judge Novoselsky issued a Rule to Show Cause. An amended rule was filed later, and Mr. Macks filed a general denial. Mr. Macks stood trial on the charge and was prosecuted by the law firm of Becker & Tennenbaum, counsel for the Respondents in the underlying probate proceeding. App. A-4.

The prosecution's evidence consisted of the testimony of one witness—Judge Budzinski. Judge Budzinski testified that Mr. Macks came to his chambers and inquired about the means for extending the appeal bond. App. C-2. Judge Budzinski testified that this communication did not cause an affront to the court and was in no way contumacious. He stated:

> [Mr. Macks] came to see me about an extension on the appeal bond and I indicated to him that he should talk to his lawyer. *And he said he was told to see me.* And he said that the letter of credit which he had filed with the Appellate Court on the appeal was expiring and he was looking for a way to get it extended.

And I told him first that I shouldn't do anything on it but then I reconsidered, and since it was merely to extend the appeal bond, I told him to leave it with me and I will see what I can do, and I will talk to the lawyers about it.

* * * * *

Q. And I am also correct that your Honor would not have engaged in any *ex parte* communication with either Mr. Macks, or for that matter, any other attorney or litigant in relation to a matter which was pending before your Honor?

A. That is correct.

Q. And am I also correct, your Honor, that you did not believe that this communication concerning this extension of this letter of credit was a matter pending before your Honor and, therefore, in violation of the *ex parte* rule?

A. That is correct.

Q. And would I also be correct, your Honor, that if you did believe that this was a violation of the *ex parte* rule this communication between you and Mr. Macks in May of 1986, that you would have terminated that conversation immediately?

A. That is correct. I certainly would have.

* * * * *

Q. And, am I also correct, your Honor, if I would say that this conversation that you had with Mr. Macks *in May of 1986* did not in any way offend the dignity of your Honor, the court or the office which you hold, or was in any way an attempt to bring disrespect upon your office? That would be a correct statement?

A. That's correct.

App. C-1-5. (emphasis added).

Based upon this evidence, Judge Novoselsky found Mr. Macks guilty of indirect criminal contempt. Judge Novo-

selsky sentenced Mr. Macks to a $500 fine and 50 hours of community service. App. D. The court denied Mr. Macks' post-trial motions which explicitly challenged the use of an interested prosecutor on due process grounds, reiterating a challenge raised at sentencing soon after this Court decided *Young v. Vuitton*, ____ U.S. ____, 107 S. Ct. 2121 (1987). App. E. Mr. Macks appealed and the appellate court affirmed the conviction, finding *inter alia* that the use of an interested prosecutor did not result in a deprivation of due process. App. A-6.

## REASONS FOR ALLOWING THE WRIT

### PROSECUTION OF MR. MACKS BY AN INTERESTED PROSECUTOR WAS IMPROPER AND DEPRIVED HIM OF DUE PROCESS.

#### A. Use Of The Interested Prosecutor Deprived Mr. Macks Of Due Process.

Due process requires that every prosecution be fair and impartial. In *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1979), this Court explained:

> [t]his requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, prevention of unjustified or mistaken deprivations and the promotion of participation in dialog by affected individuals in the decision making process.

*Id.* at 242, *citing, Carey v. Piphus*, 435 U.S. 247, 259-62, 266-68 (1978).

This requirement of fairness in our judicial process is central to our American system of justice. As this Court

stated in *Marshall*, "[t]he neutrality requirement helps to guarantee that life, liberty or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to popular government, that justice has been done,' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to finding against him." 446 U.S. at 242, *quoting*, *Joint-Anti Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring) and *citing*, *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976).

The fundamental right to fairness and impartiality in the prosecution process embraces not only the trier of fact but the prosecutor as well. *See e.g.*, *Giglio v. United States*, 405 U.S. 150 (1972) (prosecutor's failure to reveal promise of leniency made to key witness violates due process requiring a new trial); *Miller v. Pate*, 386 U.S. 1 (1967) (prosecutor's deliberate misrepresentation of the truth deprived defendant of due process); *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecutor's suppression of evidence favorable to defendant violated due process); *Alcotra v. Texas*, 355 U.S. 28 (1957) (defendant denied due process by prosecutor's failure to disclose perjured testimony); *see also*, *Heckler v. Chaney*, 470 U.S. 821 (1985) (process of reviewing charges before commencing prosecution must be fair and impartial).

"A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what of-

fenses, which persons should be utilized as witnesses, whether to enter into plea bargains, and whether any individuals should be granted immunity." *Young v. Vuitton*, ____ U.S. ____, 107 S. Ct. 2121, 2137 (1987). "[W]e must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice." *Id.* at 2141.

As a defendant facing a possible deprivation of liberty and property, Mr. Macks was entitled to the due process right of a fair and impartial prosecution. He was deprived of that right by the use of an interested prosecutor. *See Young v. Vuitton*, ____ U.S. ____, 107 S. Ct. 2124, 2141 (1984) (Blackmun, J., concurring); *Brotherhood of Locomotive Firemen and Enginemen v. United States*, 411 F.2d 312 (5th Cir. 1969) (holding use of an interested prosecutor in a criminal contempt action violated alleged contemnor's due process rights).

In *Young*, this Court prohibited the use of an interested prosecutor in a federal criminal contempt prosecution. While this Court based its decision on its supervisory authority to control actions under F.R.Cr.P. 42(b), it discussed the impropriety of using an interested prosecutor in the context of due process. Indeed, Justice Blackmun's concurrence states that he would have reached the same result on due process grounds.

**B. Prosecution By An Interested Prosecutor Created An Untenable Conflict Of Interest.**

Apart from due process concerns, the prosecution of Mr. Macks by the interested prosecutor created an untenable conflict of interest.

This Court recognized the impropriety of such a conflict in *Young v. Vuitton*, ____ U.S. ____, 107 S. Ct. 2124

(1987). *Young* involved an indirect criminal contempt prosecution for the violation of an injunction. The lawyers representing the party that obtained the injunction successfully prosecuted the contempt.

This Court focused on the inherent conflict of interest that a lawyer representing an alleged "victim" has in prosecuting a criminal action. Citing the applicable ABA Canons of Ethics, this Court stated, "[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." 107 S. Ct. at 2135. In contrast, a lawyer acting for a private litigant is bound to represent his client zealously and, therefore, is not bound to exercise the same degree of objectivity that is required of a prosecutor. *Cf.* ABA Code of Professional Responsibility (EC) 7-1 and (EC) 7-13 (1982). Accordingly, this Court concluded that, "[a] private attorney appointed to prosecute a criminal contempt, therefore, should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.**

Like the ABA Code of Professional Responsibility, the Illinois Code of Professional Responsibility prohibits conflicts of interest. Canon 5-105 states "[a] lawyer shall

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* Further, this Court noted that under federal law, prosecutorial conflicts of interest are expressly forbidden. Thus, in the federal courts, a prosecutor who pursues a contempt prosecution for the violation of an injunction benefitting his client in underlying civil proceedings "would be open to a charge of committing a felony under [18 U.S.C.] Section 208(a) [the federal prosecutorial conflicts of interest statute]. Illinois also maintains a statute which governs prosecutorial conflicts of interest, *see* Ill. Rev. Stat. ch. 14, section 6 (1987), and the Illinois courts have applied it to prohibit prosecutions by interested prosecutors. *See e.g., Gilbert v. People*, 121 Ill. App. 3d 423 (3d Dist. 1905); *Sommer v. Goetze*, 102 Ill. App. 3d 117, 429 N.E.2d 901 (3d Dist. 1981). The prosecution of Mr. Macks was in direct contravention of that statute.

decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the employment . . ." Moreover, Canon 7-105 expressly prohibits the type of conflict here. It states, "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges to obtain an advantage in a civil matter."

The criminal prosecution of Mr. Macks by his opponent's counsel in civil proceedings pending in the Illinois Supreme Court was in direct contravention to the ABA and Illinois canons. Even in the absence of any objective evidence of an attempt to use the criminal proceedings to gain an advantage in the civil proceedings or an impairment of judgment based on conflicting duties, the situation is so inherently coercive that, at a minimum, it creates an appearance of unfairness and impropriety.

### C. The Opinion Below Misapplies This Court's Holding In *Young v. Vuitton* And Demonstrates The Need For A Ruling By This Court On The Question Presented.

The court below attempted to distinguish *Young* based upon Respondent's lack of a proprietary interest in the outcome of the contempt proceeding. App. A-6. *Young* draws no such distinction. Indeed, the holding of *Young* is far broader and is based upon the inherent unfairness and impropriety of allowing an interested prosecutor to conduct the proceedings. Accordingly, a writ of certiorari should issue so that this Court can consider the due process ramifications of the use of an interested prosecutor and set forth a standard which all courts, state and federal, could easily follow.

By issuing a writ of certiorari, this Court could decide an important issue impacting on the rights of defendants

in criminal contempt actions throughout the country. *Young* implied that the use of an interested prosecutor should be prohibited in any context because it so offends traditional notions of justice and fairness. However, because the precise holding of *Young* is limited to federal contempt prosecutions under F.R.Cr.P. 42(b) and rests on this Court's supervisory authority, defendants in state criminal contempt proceedings still run the risk of being deprived of their liberty and property without the guarantee of a fair and impartial prosecution.

## CONCLUSION

For the foregoing reasons, Mitchell C. Macks respectfully asks that this Court issue a writ of certiorari to the Appellate Court of Illinois and consider this matter.

Respectfully submitted,

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# APPENDICES

# APPENDIX A

FIRST DIVISION
NOVEMBER 7, 1988

87-2557

ESTATE OF E. DAVIS WERNICK
SAMUEL WERNICK,

*Petitioner-Appellee,*

v.

MITCHELL C. MACKS,

*Respondent-Appellant.*

Appeal from the Circuit Court of Cook County.
Honorable **Benjamin E. Novoselsky,** Judge Presiding.

JUSTICE O'CONNOR delivered the opinion of the court:

Mitchell Macks appeals from a finding of contempt, issued on a Motion for Rule to Show Cause brought by the Estate of E. Davis Wernick, and the decedent's son, Samuel Wernick ("Petitioners"). For the reasons below, we affirm.

Mitchell Macks is an attorney, licensed to practice in Illinois. Macks' primary source of income for most of his career has come not from the practice of law, but from real estate investment and banking. In 1979, the petitioners brought citation proceedings in Probate Court against Macks to discover information concerning Macks'

financial dealings with the decedent and to recover the decedent's interest in real estate allegedly converted by Macks. The probate case and citation proceedings were assigned to Cook County Circuit Court Judge Henry A. Budzinski.

On November 16, 1982, while the citation proceedings were pending, Macks engaged in an *ex parte* communication with Judge Budzinski in the Judge's chambers. On November 18, 1982, during a court proceeding with Macks on the witness stand, Judge Budzinski noted the incident and admonished Macks to not attempt *ex parte* communications again.

In May, 1986 (the exact date is not specified), Macks again entered Judge Budzinski's chambers and engaged in an *ex parte* communication, concerning the renewal of a letter of credit that stood as Macks's appeal bond in the underlying case. Macks did not inform the petitioners or their attorneys of the contents of the *ex parte* communication, as required by Cook County Circuit Court Rule 17.2(b). Judge Budzinski informed the attorney for the Executor of the Wernick Estate that the communication had occurred. At the time, Judge Budzinski retained jurisdiction over certain matters in the underlying case.

On June 2, 1986, the petitioners moved for a Rule to Show Cause why Macks should not be held in contempt. They also moved for a change of venue for the contempt hearing because Judge Budzinski would be called as a witness. A Rule to Show Cause was issued against Macks on August 18, 1986, and the hearing on the motion was transferred to Judge Novoselsky. A hearing on an amended Motion to Show Cause was held on February 18, 1987.

Judge Budzinski testified that although the communication had occurred, it had been in no way contumacious. Other evidence established the first *ex parte* communication and Judge Budzinski's admonishment. Macks did not testify on his own behalf. The trial court ruled that Macks had violated Cook County Circuit Court Rule 17, and found Macks guilty of indirect criminal contempt. After

an aggravation and mitigation hearing, Macks was fined $500 and sentenced to fifty hours of community service. Macks appeals.

Courts have inherent power to punish for contempt and to maintain their authority and to administer and execute judicial power. (*Central Production Credit Association v. Kruse* (1987), 156 Ill. App. 3d 526, 531, 509 N.E.2d 136.) The power to punish for contempt rests within the sound discretion of the trial court, and a determination of contempt will not be overturned absent a clear abuse of discretion. (*Central Production Credit Association*, 156 Ill. App. 3d at 531.) An examination of the record shows that the court's ruling was a sound exercise of its discretion, and that Macks's arguments to the contrary are without merit.

Macks first argues that the evidence was insufficient to support a finding of contempt, relying primarily on Judge Budzinski's testimony to show that the communication did not violate Cook County Circuit Court Rule 17. Judge Budzinski testified that Macks' visit was in no way contumacious, but it is evident that he was interpreting Rule 17 to forbid only *ex parte* communications that attempted to influence the judge in a matter pending. Moreover, Judge Budzinski testified as a witness, therefore his interpretation of Rule 171, even if correct, was not controlling.

Rule 17.1, enacted February 1, 1985, and in effect in May, 1986, states, "No judge shall permit and no lawyer shall engage in *ex parte* communications unless allowed in law in connection with any matter pending before said judge." By its terms, Rule 17.1 forbids *any ex parte* communications without regard to whether or not it was intended to influence the judge in a pending matter. Rule 17.2 requires that the absent party be informed within two days, either in court, or through a summary of the communication. Thus, it is relevant only that an *ex parte* communication occurred, and that Macks failed to inform the petitioners.

The record categorically shows that Macks engaged in an *ex parte* communication. Judge Budzinski testified that an *ex parte* communication occurred in May, 1986. Additionally, Macks made no attempt to inform the petitioners, as required by Circuit Court Rule 17.2. Further evidence shows that when Macks entered Judge Budzinski's chambers in May, 1986, it was his second *ex parte* communication, and that Macks had been admonished after the first. Macks engaged in *ex parte* communication in clear violation of the court's instruction to refrain from such action. The evidence amply supports the finding of contempt.

Macks next argues that the trial court erred by not applying the "reasonable doubt" standard of proof in the contempt hearing, because the trial court based the contempt finding on violations of Circuit Court Rule 17, and Illinois Disciplinary Rules 102(a)(1) and (5), (Ill. Rev. Stat. 1987, ch. 110A, foll. par. 774). Macks argues that because violations of the Disciplinary Rules are not proof *per se* of criminal contempt, (*see People v. Wolf* (1987), 162 Ill. App. 3d 57, 514 N.E.2d 1218, *app. den.*, ____ Ill. 2d ____) and because Circuit Court Rule 17 is merely a codification of the Disciplinary Rules, the trial court's reliance on those violations to find guilt was misplaced. This argument is without merit.

In the instant case, Macks was not found guilty of contempt because he had violated any Disciplinary or Circuit Court rules. Violation of Circuit Court Rule 17 merely established that Macks had engaged in an *ex parte* communication, which he had been admonished not to attempt. The contempt was based not solely on violation of Circuit Court Rule 17, but on the admonishment after the first *ex parte* communication as well. Even had there been no Rule violation, the evidence clearly established that Macks engaged in an *ex parte* communication, contrary to the court's admonishment, and even had the reasonable doubt standard not been applied, the evidence presented in the contempt hearing clearly met that standard.

Macks also argues that because counsel for the petitioners, opposing counsel in the underlying probate case,

prosecuted the contempt proceeding, Macks was deprived of due process, and that having an interested prosecutor create an untenable conflict of interest. Both assertions are without merit.

Macks argues that he was deprived of due process. Macks, however, was afforded every safeguard of due process. Macks had timely and sufficient notice of the proceeding. He was afforded a hearing on the merits of the issue before an impartial judge. He was given a second hearing on aggravation and mitigation. He enjoyed adequate and able representation at both hearings. He enjoyed the privilege against self-incrimination. All these safeguards were provided before any deprivation of liberty or property. Macks can make no tenable argument that he was deprived of due process.

Macks first raised the issue of whether the petitioners were interested "prosecutors" in his post-trial motion to dismiss. Where an issue is first raised in a post-trial motion, the reviewing court need only determine whether the trial court abused its discretion in denying the motion. (*See Coleman v. Windy City Balloon Port. Ltd.* (1987), 160 Ill. App. 3d 408, 418-19, 513 N.E.2d 506, *app. den.*, ____ Ill. 2d ____; *Rahill Corp. v. Urbanski* (1984), 123 Ill. App. 3d 769, 777, 463 N.E.2d 765.) In the instant case, the ruling was based on substantial evidence, and the trial court considered the authorities presented by Macks in support of the motion. There was no abuse of discretion.

Even if the issue of the interested prosecutor were considered on its merits, Macks cannot prevail. In Illinois, indirect criminal contempt proceedings may be instituted by private counsel. (*Marcisz v. Maricisz* (1976), 65 Ill. 2d 206, 357 N.E.2d 477; *47th & State Currency, Etc. v. B. Coleman Corporation* (1977), 56 Ill. App. 3d 229, 371 N.E.2d 294, *app. den.* (1978), 71 Ill. 2d 598.) By labelling opposing counsel "prosecutors", Macks raised issues both inapplicable in the instant case and altogether absent: the appearance of unfairness, possible misrepresentation of facts, and the difficulty of having a "prosecutor" with a

proprietary interest in the outcome of the contempt hearing. Macks relies on *Young v. Vuitton*, ____ U.S. ____, 107 S. Ct. 2124 (1987), which held that appointment of private counsel to prosecute a criminal contempt was reversible error where the private counsel was the direct beneficiary of the contempt order. In *Young*, as well as the other cases cited by Macks, the contemnors had ignored injunctions issued in the underlying case, which had been brought by the attorneys that ultimately prosecuted the contempt hearings. (*See also Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Polo Fashions, Inc. v. Stock Buyers International, Inc.* (6th Cir. 1985), 760 F.2d 698, *cert. den.*, ____ U.S. ____, 107 S. Ct. 2480.) Winning the contempt order meant enforcement of the injunction through extraordinary means, to the direct benefit of the party seeking the contempt.

In the instant case, however, the petitioners had no proprietary interest in the outcome of the contempt hearing. The contempt ruling was issued not to enforce compliance with orders in the underlying case, but to penalize non-compliance, and enforce future compliance, with the prescribed rules of court procedure. The petitioners filed the Motion for Rule to Show Cause upon which the hearing was held, and as the moving parties, they appropriately presented their motion at the hearing. They had no proprietary interest in the outcome of the contempt hearing; therefore no conflict of interest arose.

Macks also asserts that the petitioners violated Illinois Disciplinary Rule 7-105, which prohibits the threat of criminal proceedings to gain an advantage in a civil matter. Petitioners asked for further prosecution against Macks for perjury, when Macks admitted in the aggravation and mitigation hearing that he had engaged in *ex parte* communication. Rule 7-105 is inapplicable, however, to a situation where, as in the instant case, one party petitions the court to enforce the procedural rules by means of appropriate sanctions.

Finally, it should be noted that the power to impose contempt is extraordinary, and should be limited to ex-

treme circumstances. (*Central Production Credit Association v. Kruse* (1987), 156 Ill. App. 3d 526, 531, 509 N.E.2d 136.) Macks' behavior throughout the contempt hearing and the underlying case make abundantly clear that the instant case is one of extreme circumstances. As a witness in the underlying probate proceeding, Macks was repeatedly evasive in answering questions, disrespectful to the court, withheld evidence, and at one point while on the witness stand, called opposing counsel a "schmuck". Macks continued such behavior despite repeated warnings.

As a witness in the aggravation and mitigation hearing, Macks' demeanor was not much better. Before imposing sanctions, the trial court, weighing Macks' demeanor and conduct before the court against the testimony of witnesses testifying in mitigation, stated, "it seems as if the witnesses testifying in mitigation were discussing another individual, not the individual on trial. He may be a charitable, loving father, a pillar of his synagogue, but [he is] also an individual who has no regard or respect of rules of the court or attorneys' conduct." (R. 400-401.) Macks' behavior demonstrated, if not epitomized, the extreme circumstances in which a contempt finding is warranted.

In summary, Mitchell Macks was found guilty of contempt by overwhelming evidence that showing that, after having been admonished for having engaged in *ex parte* communication with Judge Budzinski, Macks engaged in a second *ex parte* communication. The trial court applied the proper standard of proof in the contempt hearing, and the hearing, being on a motion by the opposing counsel in the underlying case, was properly conducted by that counsel. Further, Macks enjoyed every due process safeguard. The trial court's finding of contempt was within the scope of its sound discretion, and the sanctions imposed were proper. The finding of contempt is therefore affirmed.

Affirmed.

MANNING, J., and QUINLAN, J., concurring.

# APPENDIX B

*(Letterhead Of)*

ILLINOIS SUPREME COURT
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February 1, 1989

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Chicago, IL 60603

No. 68030—Estate of E. Davis Wernick (Samuel Wernick, respondent, v. Mitchell C. Macks, petitioner). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 23, 1989.

# APPENDIX C

[1]* State of Illinois
County of Cook—ss:

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—PROBATE DIVISION

IN THE MATTER OF THE ESTATE
OF
E. DAVIS WERNICK,

*Deceased.*

File No: 77 P 6498
Docket: 831
Page: 497

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the Honorable BENJAMIN E. NOVOSELSKY, Judge of said Court, on the 18th day of February, A.D. 1987.

Present:

MR. BARRY A. FEINBERG,
appeared for the Executor, Garson Wernick;

MR. THEODORE M. BECKER,
appeared for the Petitioner, Samuel S. Wernick;

MR. DAVID R. HERZOG,
appeared for the Respondent, Mitchell Macks.

* * * * *

* Numbers in brackets refer to the Court Reporter's original pagination of the Report of Proceedings.

[12] Q. Thank you, Judge. Judge, within the week prior to May 30 of 1986, did Mr. Macks come to your chambers and attempt to engage you in any communication?

A. Yes, he did.

Q. And do you recall at this time or can you give [13] us your best recollection of what was said to you by Mr. Macks?

A. He came to see me about an extension on the appeal bond and I indicated to him that he should talk to his lawyer. And he said he was told to see me.

And he said that the letter of credit which he had filed with the Appellate Court on the appeal was expiring and he was looking for a way to get it extended.

And I told him first that I shouldn't do anything on it but then I reconsidered, and since it was merely to extend the appeal bond, I told him to leave it with me and I will see what I can do, and I will talk to the lawyers about it.

Q. When you referred to "it," was there a particular document that he had brought with him?

A. Yes, there was.

Q. And do you recall what the nature of that document was?

A. No, I am sorry, I don't. I don't even know if I looked at the document.

Q. Is that a document that you subsequently made a matter of record in this case?

A. That is correct.

* * * * *

*Cross Examination by Mr. Herzog.*

Q. Good morning, your Honor.

A. Good morning.

Q. Your Honor, it's correct that the case against Mitchell Macks, the Estate of Wernick versus Mitchell Macks which was tried before your Honor resulted in a judgment order in January of 1985 as you testified?

A. Correct.

Q. And there were certain post-trial motions filed by the parties with respect to that case?

A. That's correct.

[17] Q. Those post-trial motions were disposed of as of May of 1985, is that correct?

A. As of May of '85?

Q. Yes, your Honor.

A. Yes.

Q. And as far as you know, your Honor, there was an appeal and a cross appeal taken at the end of May and June of 1985?

A. That is correct.

Q. And so that any proceedings with respect to this case against Mitchell Macks—not as to the estate generally—were no longer before your Honor in June of 1985—

MR. BECKER: Your Honor, I have an objection to that.

MR. HERZOG: —that matter having then gone to the Appellate Court. Would that be correct?

MR. BECKER: My objection is, that calls for a legal conclusion.

THE COURT: Objection sustained.

MR. HERZOG: Your Honor, after—

THE COURT: Pardon me. Let the record reflect the Court ruled on that previously at two separate hearings.

All right, Counsel.

[18] MR. HERZOG: Q. Your Honor, after June of 1985, there were no motions with respect to the case of the

Estate of Wernick versus Macks before your Honor, is that correct?

A. That is correct.

Q. Now in this conversation with Mr. Macks which occurred in May 1986, do you recall that Mr. Macks stated to you that he was told by the clerk to see you with respect to the procedure in filing this amendment to the letter of credit?

A. No, I don't remember that.

Q. At this time in May of 1986, your Honor, it would be correct that you could not have granted an extension to the letter of credit?

A. That is correct.

Q. And that would have been because the only body which could have granted an extension to the letter of credit would have been the Appellate Court where the case was presently pending, would that be correct?

MR. BECKER: Your Honor, I have the same objection to that question.

MR. HERZOG: It has never been addressed, your Honor. The judge is more than capable—

MR. BECKER: The prior question I believe that was [19] put to the witness was as to what he felt he could do, but this now calls for a conclusion as to which forum could rule. I believe it's distinguishable.

MR. HERZOG: I believe he can address what his opinion is.

THE COURT: I think Judge Budzinski is familiar with the appellate procedure and I think he can answer that. The objection is overruled.

MR. BECKER: Do you want the question repeated?

THE WITNESS: Would you, please.

(From the record above, the reporter read back the last question.)

A. That is correct.

MR. HERZOG: Q. So as far as your understanding is concerned, your Honor, the matter of the extension of the letter of credit was not a matter pending before your Honor?

A. That's true.

Q. Now your Honor has testified, and I am sure that your Honor is well aware of the rule of conduct of judges concerning ex parte communications and the rule prohibiting such ex parte communications with lawyers. Would that be correct?

[20] A. You are talking about the rule in effect prior to January 1, 1987?

Q. Yes, I am.

A. Yes.

Q. And I am sure that your Honor is punctilious in the observance of those rules, am I correct?

A. I hope to be.

Q. And am I also correct that your Honor would not have engaged in any ex parte communication with either Mr. Macks or, for that matter, any other attorney or litigant in relation to a matter which was pending before your Honor?

A. That is correct.

Q. And am I also correct, your Honor, that you did not believe that this communication concerning this extension of this letter of credit was a matter pending before your Honor and, therefore, in violation of the ex parte rule?

A. That is correct.

Q. And would I also be correct, your Honor, that if you did believe that this was a violation of the ex parte rule, this communication between you and Mr. Macks in May of 1986, that you would have terminated that conversation immediately?

[21] A. That is correct. I certainly would have.

Q. And am I also correct, your Honor, if I would say that this conversation that you had with Mr. Macks in May of 1986 did not in any way offend the dignity of your Honor or the Court or the office which you hold, or was in any way an attempt to bring disrespect upon your office? Would that be a correct statement?

A. That is correct.

Q. We have no further questions, your Honor. Thank you, your Honor.

* * * * *

# APPENDIX D

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT–PROBATE DIVISION

IN THE MATTER OF THE ESTATE
OF
E. DAVIS WERNICK

IN RE MITCHELL C. MACKS, Contemnor

No. 77 P 6498
Docket 831
Page 497

## ORDER

This cause coming to be heard for the imposition of sanctions by the court on the court's finding of contempt against Mitchell C. Macks, and the court being fully advised in the premises and for the reasons stated from the bench,

It is hereby ordered, authorized and decreed that sanctions are hereby imposed against Mitchell C. Macks as follows:

1. Mitchell C. Macks shall pay a fine into the clerk's registry in the amount of $500.

2. Mitchell C. Macks shall serve 50 hours of community service for a charitable organization.

3. Mitchell C. Macks shall pay the reasonable attorneys' fees and expenses of petitioner related to the contempt proceeding, to be assessed by the court upon the filing of a petition thereafter.

It is further ordered

That the oral motion of respondent Mitchell C. Macks for a stay of this order and the imposition of sanctions is denied.

ENTERED: June 19, 1987

/s/ BENJAMIN E. NOVOSELSKY
Judge

# APPENDIX E

[1]* State of Illinois
County of Cook—ss:

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—PROBATE DIVISION

IN THE MATTER OF THE ESTATE
OF
E. DAVIS WERNICK,

*Deceased.*

77 P 6498
D 831
P 497

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the Honorable BENJAMIN E. NOVOSELSKY, Judge of said Court, on Tuesday, the 11th day of August, A.D. 1987, at the hour of 10:00 A.M.

Present:

MR. STEVEN F. MOLO,
appeared on behalf of Mitchell C. Max;

* Numbers in brackets refer to the Court Reporter's original pagination of the Report of Proceedings.

MR. THEODORE M. BECKER,
appeared on behalf of Samuel Wernick;

MR. BARRY FEINBERG,
appeared on behalf of the executor,
Mr. Garson Wernick.

THE CLERK: Estate of E. Davis Wernick.

THE COURT: Estate of E. Davis Wernick, 77 P 6498, Docket 831, Page 497. Good morning, gentlemen. Mr. Feinberg, you represent who?

MR. FEINBERG: The executor, Mr. Garson Wernick.

THE COURT: Mr. Becker represents?

MR. BECKER: The petitioner.

THE COURT: The petitioner; and Mr. Molo represents the respondent; is that correct?

MR. MOLO: That's correct, Judge.

THE COURT: All right. It is a post-trial motion, ruling on a post-trial motion filed by Mr. Molo on the—forgot the date. The date is not that important.

Let's see if you gentlemen want to stand or do you want to sit down? Be my guest, either way, because I've got a long ruling here. If you want to stand, fine. If you want to sit, that is all right with me. I would rather read it to you because I've done extensive research on this one, and if the Supreme Court would mind their own business I wouldn't have so much work. Okay.

Ms. Reporter, the contemnor is the respondent in the matter of E. Davis Wernick, deceased.

During the course of the probate proceedings, [3] respondent entered the chambers of the Judge presiding over the underlying proceeding and engaged the Judge in an ex parte communication relating to the case in violation of the Rules of the Circuit Court and also the Rules of the Supreme Court as promulgated by our old rules of conduct.

Respondent was then admonished and threatened with a contempt citation. After a second attempt at an ex parte communication with the Judge, respondent was again admonished, this time in open court.

Counsel for the petitioner then moved for a Rule to Show Cause why the respondent should not be held in contempt. The motion was granted and the contempt proceeding was transferred to the Presiding Judge of the Probate Division in order for the reviled judge to testify about the ex parte communication.

Let the record reflect that the matter was drawn by lot on the reassignment. Off the record.

(Discussion omitted from the record.)

THE COURT: Counsel for petitioner prosecuted a contempt.

The Presiding Judge found the respondent guilty of diect criminal contempt and they held a hearing on mitiating and aggravating circumstances [4] before sanctioning respondent. The post-trial motion to vacate a contempt judgment respondent contends that Counsel for petitioner was an interested party, and as such, should not have been allowed to prosecute the contempt action.

The two issues as far as the post-trial motion was concerned was: One, whether Counsel for the party-litigant may prosecute a contempt action against the adverse party; and, two, whether the Probate Court can punish contemnor found guilty of criminal contempt.

Prior to 1987, it was a well settled law in Illinois that indirect criminal contempt proceedings may be prosecuted by the people, an amicus curiae, or private party. People versus Marcisz, 32 Illinois Appellate 3d, 467, 1975. However, with respect to prosecution by a private party, the law is now unclear due to a recent United States Supreme Court decision. In the case of Young versus United States, ex rel, Vuitton, U. S. 55, U. S. L. W., 4677, May 26, 1987, the Supreme Court held that:

"Counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging violation of that order."

[5] While the mandate espoused in Young by our highest court appears to give validity to respondent's contentions, that case can be given a narrow interpretation and distinguished on its facts from the instant case. This distinction will render inapplicable the law espoused in Young and re-establish the principles laid out in Marcisz. Respondent's argument would then be subverted and his post-trial motion to vacate the contempt judgment will be denied.

Now, in Young, petitioners consented to the entry of a permanent injunction prohibiting them from infringing the trademark of the respondent leather goods manufacturer. Young at page 4677. Thereafter, a Federal District Court found probable cause to believe that petitioners were engaged in conduct violative of the injunction. The court therefore granted the request of respondent's attorneys for appointment of special counsel to represent the government in the investigation and prosecution of a criminal contempt action against petitioners. A jury ultimately convicted petitioners either criminal contempt or of aiding and abetting that contempt. The Court of Appeals affirmed, [6] rejecting petitioner's contentions that the appointment of respondent's attorneys as special counsel violating their right to be prosecuted by an impartial prosecutor. Petitioners then appealed to the United States Supreme Court renewing their contentions concerning a right to an impartial prosecutor.

In its opinion the United States Supreme Court addressed certain evils inherent in any contempt action prosecuted by an independent party. They were concerned that the appointment of counsel for an interested party to prosecute the contempt action in this case at a minimum created opportunities for conflicts to arise and create at least the appearance of impropriety. Young at page 4682. The court argued that the prosecutor in a contempt action is

appointed solely to pursue the public interest and vindication of the court's authority. Young at page 4688. Furthermore, they argued that, such conduct would violate ethical standards prohibiting conflicts of interest since the attorneys could not discharge the obligation of undivided loyalty to both clients where both have a direct interest.

A conflict develops, they argue, when a [7] prosecutor brings a tenuously supported prosecution if such a course promises financial or legal rewards for the private client. Also, a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on recommendations against criminal charges.

Finally, the court contended that the private prosecutor could use his position to gain material information enhancing the position of his case.

While those potential conflicts were inherent in the fact structure of Young they do not exist in the instant case. There is simply no proof that the attorney for the petitioners here will not vigorously attempt to vindicate the court's authority. In Young the beneficiary of the court order prohibiting the trademark infringement was the party whose attorneys were appointed special prosecutor in the contempt action. Therefore, that party stood to gain significant financial and legal rewards by possibly bringing a tenuously supported prosecution. Indeed, the action would prevent further infringement resulting in increased profits [8] to the party. The result is not the same in the instant case. Here, the beneficiary of any contempt action is the court and not the private party. There are no injunctive orders beneficial to the petitioner that are alleged to have been violated. Thus, the petitioner does not stand to gain any financial or legal reward by prosecuting the contempt action. It is true, of course, that the court itself stands to gain as beneficiary of any contempt proceeding. Since the court was reviled by respondent's ex parte communications, a finding of contempt can only serve to vindicate their authority.

In Young, the court was also concerned that the special prosecutor might abandon his quest to vindicate the court's authority if a fruitful settlement were proposed by the opposite party. The court argued that the prosecutor might decide to recommend that no charges be brought against the alleged contemners if they would agree to a special prosecutor's settlement demands. In essence, the court was concerned that the special prosecutor would use the contempt proceeding as a bargaining chip. This is of no concern to the court in the present case.

In Young, the alleged contumacious conduct [9] was still under investigation giving the special prosecutor the bargaining chips he needed to demand certain rewarding fruits. In this case the investigation was complete and a Rule to Show Cause was granted. Since the Judge could have summarily punished the respondent in his discretion, the petitioner could not use the contempt action to his advantage. Any attempt to abandon the prosecution by the petitioner, would have resulted in the court attempting to vindicate its own authority. Therefore, petitioner does not stand in the same petition to gain rewarding fruits by abandoning the prosecution of the respondent.

Finally, the court in Young was concerned that the special prosecutor might use the contempt action in order to gain material information in that case as well as information about a defamation action filed by petitioner against special prosecutors. While there may have been information to be gleaned from the prosecution of the contempt action in Young, such is not the case here. The substance of respondent's ex parte communications with the Judge in the instant case was revealed in open court and while it related to the underlying probate proceeding, the information [10] was not material. Therefore, petitioners were in no position to gain information beneficial to their client's interests.

These evils addressed in the analysis above are significant enough in Young, given its fact structure, to force

the Supreme Court to hold that, "counsel for a party that is beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging violation of that order." Since these evils are not inherent in the instant case and since there is no violation of a court order beneficial to the petitioner, his appointment as prosecutor of respondent in the contempt action is not governed, in this court's opinion, by the mandate of Young.

The second question: The power to punish for contempt does not depend on a constitutional or legislative grant. In Re: G.B., 88 Illinois 2d, 36, 1981. All courts are vested with the inherent power to punish for contempt as essential to maintenance of their authority and proper administration and execution of their judicial powers. In Interest of Johnson, 134 Illinois Appellate 3d, 385, 1985. Generally speaking only the court offended has the [11] power to punish for contempt. Illinois Commerce Commission versus Salamie, 54 Illinois Appellate 3d, 465, 1977.

In regard to contumacious conduct constituting direct contempt, since the conduct is committed in the presence of the court, the contemner may be adjudged and sanctioned in a summary manner. Sunset Travel, Inc. versus Lovecchio, 113, Illinois Appellate 3d, 669, 1983. While one Illinois court has held that a direct criminal contempt committed in the presence of the court must be punished by the court against whom the contempt has been committed. That was Daniel Boone Woolen Mills versus Laedeke, 238 Illinois Appellate, 92, 125, the United States Supreme Court has ruled that a defendant in a criminal contempt proceeding should be given a public trial before a judge other than the one reviled by the contemner. Mayberry versus Pennsylvania, 400 U.S. 455, 1971.

The facts indicate that the reviled judge was the same judge presiding over the underlying probate proceeding. Instead of punishing the contemner summarily he granted petitioner's motion for a Rule to Show Cause why respondent should not be held [12] in contempt. Consequently, the judge became a material witness in any subsequent

indirect contempt action. Therefore, consistent with the law in Mayberry, the judge chose to recuse himself and transfer venue to the Presiding Judge of the probate division. There a hearing took place with respondent adjudged guilty of criminal contempt. While the courts in Illinois as well as other jurisdictions hold that, "only the offended court has the power to punish for contempt," a literal interpretation of this law would serve to restrict the circuit court system from any attempt to vindicate its authority. Although the respondent reviled a Judge in a particular by placing him in a compromising position, the respondent also undermined the integrity of the entire circuit court system of Cook County. Thus, the offended court is the Circuit Court and not necessarily the court with jurisdiction over the underlying probate proceeding.

In conclusion, gentlemen, in this court's opinion the mandate of Young, it is clear that, "an interested party who is a beneficiary of a court order may not prosecute a contempt action for violation of the same order." However, the mandate is narrow [13] and limited to particular facts of that case and that case only. The same evils present in Young are not present in the instant case before this court and therefore Young is inapplicable. This court is not required to follow this mandate and the law of Illinois remains, "indirect criminal contempt proceedings may be prosecuted by the people, an amicus curiae or a private party." This is not to say that Young will never be applicable in Illinois since Young is the "law of the land." When the evils inherent in the Young case present itself in any future contempt action in Illinois, then Young in its mandate may possibly govern the proceedings.

With respect to the second issue, since the reviled judge chose, in his discretion, not to vindicate the Circuit Court's authority summarily punishing the respondent, the court who tried the indirect contempt case is given the power of vindication. This court, by hearing the contempt proceedings, has the inherent power to punish the contemner through the imposition of sanctions. Then and only then will the court's, "authority and integrity be vindi-

cated." It is therefore the [14] order of this court, the post-trial motion is denied. Off the record.

(Discussion omitted from the record.)

MR. MOLO: I appreciate your time.

THE COURT: Now, what are we doing? Just draw an order, post-trial motion denied. Now, what do we do?

MR. BECKER: I think the last thing before your Honor is the petition for attorneys' fees.

THE COURT: I have no petition.

MR. BECKER: Which I have not yet filed. We will present that on motion in the near future.

MR. MOLO: On that line, Judge, as you stated in your opinion, there is certainly an issue here, and I have consulted with my client, at least its his indication at this point that he would like to take an appeal, have the Appellate Court rule on that issue.

THE COURT: I would suggest this. I cannot tell the Appellate Court what to take and what not to take.

MR. MOLO: I understand that.

THE COURT: They may not take it. I don't know. They may take it. Who knows. I think at this

* * * * *

No. 88-1639

Supreme Court, U.S.
FILED
JUN 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

# In The Supreme Court of the United States
## October Term, 1988

**IN THE MATTER OF THE ESTATE OF E. DAVIS WERNICK, Deceased**

**MITCHELL C. MACKS,**

*Petitioner,*

*v.*

**SAMUEL WERNICK,**

*Respondent.*

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

## BRIEF IN OPPOSITION FOR RESPONDENT

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No. 88-1639

# In The
# Supreme Court of the United States
# October Term, 1988

IN THE MATTER OF THE ESTATE
OF
E. DAVIS WERNICK, Deceased

MITCHELL C. MACKS,

*Petitioner,*

*v.*

SAMUEL WERNICK,

*Respondent.*

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois,
First Judicial District

## BRIEF IN OPPOSITION FOR RESPONDENT

Respondent Samuel Wernick respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the Appellate Court of Illinois, First Judicial District. That decision affirmed the contempt finding entered against Mitchell Macks. The appellate court reviewed the record and concluded that Macks was afforded every safeguard of due process, including a hearing before an impartial judge properly

conducted by opposing counsel, and that Macks was found guilty of contempt by "overwhelming evidence". *In re Estate of Wernick*, 176 Ill. App. 3d 153, 160, 530 N.E.2d. 1127, 1131 (1st Dist. 1988). Pet. App. at A-5, A-7.[1]

## STATEMENT OF THE CASE

Respondent submits this statement pursuant to Rules 22.1 and 34.2 to correct substantial inaccuracies and omissions in the statement submitted by the petitioner.

### The Underlying Probate Court Proceedings

Garson Wernick, Executor of the Estate of E. Davis Wernick and the elder of the decedent's two sons, and Samuel Wernick[2] in 1979 brought citation proceedings in the Circuit Court of Cook County Probate Division against Mitchell C. Macks.

Macks is a licensed attorney. The decedent was a physician. Macks and the decedent were cousins, neighbors and had a close personal relationship. Macks acted as the decedent's attorney and invested in a number of properties with the decedent.

The citation proceedings were brought to discover information concerning Macks' financial dealings with the decedent and to recover the decedent's one-half share in two parcels of real estate which the decedent co-owned with Macks and which Macks claimed the decedent assigned to him in 1977 just days before the decedent's death from cancer. Macks claimed he gave the decedent a promissory note in exchange for the assignment, but the note was never found and Macks produced no copy of the note. The Estate claimed that no note ever existed, that Macks gave the decedent no consideration for the assignment, and that the Estate was entitled to the decedent's share of the property or its value.

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[1] The Petition for Writ of Certiorari and the Appendices to the Petition are cited herein as "Pet." and "Pet. App.," respectively.

[2] Garson Wernick, Executor and Samuel Wernick are sometimes hereinafter collectively referred to as the "Estate". Samuel Wernick is hereinafter referred to as "Wernick".

**Macks' 1982 *Ex Parte* Communication**

The citation proceedings were presided over by Probate Court Judge Henry A. Budzinski. (R. 126.) On November 16, 1982, while the citation proceedings were pending, Macks entered the chambers of Judge Budzinski to speak with him *ex parte* about the citation proceedings. (R. 130.) On November 18, 1982, in open court, while Macks was on the witness stand in the citation proceedings, Judge Budzinski directly admonished Macks for engaging in that *ex parte* communication:

> THE COURT: And let me indicate on the record Mr. Macks was in my office Tuesday, wanted to know when this was all going to be over and why he's being brought in the Court. I told him he's got a lawyer; the lawyer will advise him. It's improper for you to ask the Judge any questions in the court or outside of Court, sir; as a lawyer you should know that.
>
> THE WITNESS: Why –
>
> THE COURT: You put the Court in an embarrassing position by doing that.

(R. 510-511.) When Judge Budzinski concluded his admonition, Macks responded "shall I continue to be harrassed and not protest?" (R. 511.) Judge Budzinski told Macks it was not to happen again. (R. 130.)

**The Judgment In The Recovery Citation Proceeding**

The recovery citation was tried in December 1984. The probate court ruled in January 1985 that Macks had breached his fiduciary duty to the decedent and ordered Macks to pay to the Estate the decedent's share of the proceeds from the sale of one of the parcels of real estate which Macks sold after the decedent's death, plus prejudgment interest at the statutory rate of 5% for vexatious delay, and to transfer to the Estate the decedent's beneficial interest in the other parcel of real estate which Macks retained. (C. 68, R. 132, 627-628.) After the judgment was entered, the probate court approved, over the Estate's objection, an unsecured letter of credit issued by a local bank which Macks controls to stand as Macks' appeal bond. (R. 133.)

**Appeals From The Judgment**

Cross-appeals were taken to the Illinois Appellate Court. (C. 69.) In its decision in the cross-appeals from the judgment on the recovery citation, the appellate court affirmed the probate court's ruling that Macks had breached his fiduciary duty to the decedent, affirmed the relief granted to the Estate, and also held that the Estate was entitled to further relief in the form of prejudgment interest at the prime rate, punitive damages and attorney fees and expenses pursuant to § 2-611 of the Illinois Code of Civil Procedure (which, like Fed. R. Civ. P. 11, sanctions litigants for false pleadings). *In Re Estate of Wernick*, 151 Ill. App. 3d 234, 502 N.E.2d 1146 (1st Dist. 1986).

Macks petitioned the Illinois Supreme Court for leave to appeal, which was granted. 114 Ill. 2d 546, 508 N.E.2d 737. In the Illinois Supreme Court, Macks conceded that he had breached his fiduciary duty to the decedent. Macks appealed only from the appellate court's enhancement of the relief granted to the Estate. The Illinois Supreme Court affirmed the appellate court's award of prime rate interest, holding that it was in lieu of statutory interest, and reversed the appellate court's awards of punitive damages, attorney fees and expenses. *In re Estate of Wernick*, 127 Ill. 2d 61, 535 N.E.2d 876 (1989).

**The Circuit Court Of Cook County Rule Prohibiting *Ex Parte* Communications**

On February 1, 1985, shortly after Judge Budzinski entered judgment against Macks in the recovery citation proceeding, Circuit Court of Cook County Rule 17 went into effect, prohibiting any attorney from engaging in *ex parte* communications with any judge in connection with any matter pending before that judge. (R. 174.) Circuit Court Rule 17.1 provides:

> No judge shall permit and no lawyer shall engage in *ex parte* communications, unless allowed by law, in connection with any matter pending before said judge.

Circuit Court Rule 17.2(b) provides that in the event an *ex parte* communication occurs:

> If a hearing is not scheduled within two full court days of said communication, the lawyer who has initiated

said communication shall promptly serve a written summary of the contents of said communication on all parties of record and the judge.

**Macks' 1986 *Ex Parte* Communication**

After the entry of the judgment on the recovery citation and approval of the objectionable letter of credit as Macks' appeal bond, the probate court continued to retain jurisdiction over aspects of the citation proceedings and the parties while the cross-appeals were pending. (R. 75-76, 139, 145-147, 151.) In May 1986, Macks *again* entered Judge Budzinski's chambers and engaged him in another *ex parte* communication relating to the renewal of the letter of credit. (C. 70, R. 126, 134-136.) As mentioned above, the Estate had objected to the letter of credit when it had been tendered initially as the appeal bond, thus Macks could anticipate an objection to its renewal. Nevertheless, Macks did not notify the other parties or their counsel that he was going to speak to Judge Budzinski about the renewal of the letter of credit. After the *ex parte* communication, Macks did not serve upon the parties or their counsel a written summary of the *ex parte* communication as required by Circuit Court Rule 17.2(b). (R.3.) Judge Budzinski's office notified the attorney for the Executor that the *ex parte* communication had occurred. (R. 2, 630.)

**Initiation Of The Contempt Proceeding**

On June 2, 1986, Wernick filed a Motion for Rule to Show Cause why Macks should not be held in contempt. (C. 7-9.) Because Judge Budzinski was a witness to Macks' successive *ex parte* communications, Wernick simultaneously filed a Motion for Change of Venue. (C. 10-12.) The Motion for Rule to Show Cause thereupon was transferred to Judge Benjamin E. Novoselsky, the Presiding Judge of the Probate Division. (C. 18.)

**Pre-Trial Proceedings**

Macks filed a Motion to Strike and Dismiss the Motion for Rule to Show Cause. (C. 24-27.) Macks filed authorities in support of his motion. (C. 33-34.) After a hearing, Judge Novoselsky denied Macks' Motion to Strike and Dismiss. (C. 29.)

On August 8, 1986, a Rule to Show Cause issued against Macks. (C. 35.) On October 6, 1986, Macks filed a Motion to Strike

the Rule to Show Cause. (R. 40-42.) On October 10, 1986, leave was granted to file an Amended Rule to Show Cause. (C. 44.) An Amended Rule to Show Cause was filed on November 13, 1986. (C. 45-53.) Macks then filed a Motion to Strike certain portions of the Amended Rule to Show Cause. (C. 56-58.) The Amended Rule to Show Cause was further amended on December 22, 1986. (C. 59.) On December 23, 1986, Macks filed an Answer to Amended Rule to Show Cause in which he *denied* the charges. (C. 60.)

**The Contempt Hearing**

An evidentiary hearing under the standards for indirect criminal contempt was held on February 18, 1987, at which time Judge Novoselsky took evidence, admitted exhibits and heard argument of counsel. (C. 66.) Judge Budzinski testified as a witness at the contempt hearing. (R. 125.) Judge Budzinski testified that Macks is a lawyer admitted to practice in the state of Illinois and a party to proceedings pending before him. (R. 136.) Judge Budzinski testified that Macks' engaged him in the November, 1982 *ex parte* communication and that he admonished Macks. (R. 131.) Judge Budzinski testified that notwithstanding the prior admonition, Macks entered Judge Budzinski's chambers in May, 1986 and engaged Judge Budzinski in another *ex parte* communication concerning the renewal of the letter of credit that stood as Macks' appeal bond. (R. 134-137.)

Although Macks, in his Answer to Amended Rule to Show Cause, had *denied* the charges rather than standing strictly on his Fifth Amendment right, Macks elected not to testify at the contempt hearing. On February 23, 1987, Judge Novoselsky found Macks in contempt of court. (C. 71.)

**The Aggravation And Mitigation Hearing**

Before sanctioning Macks on the contempt finding, Judge Novoselsky held an aggravation and mitigation hearing on June 10 and 12, 1987. (R. 194, 286.) Macks testified as a witness at that hearing. Macks *admitted* that he entered Judge Budzinski's chambers in May, 1986 and engaged Judge Budzinski in an *ex parte* communication concerning renewal of the letter of credit that stood as Macks' appeal bond. (R. 249, 257, 259.) (Macks had previously *denied* that charge.) (C. 60, R. 251-252.) Macks *admitted* that he entered Judge Budzinski's chambers in

November, 1982 and engaged Judge Budzinski in a prior *ex parte* communication concerning the citation proceedings. (R. 265.) Macks *admitted* being admonished by Judge Budzinski after the November, 1982 *ex parte* communication. (R. 261-262).

**Macks' Demeanor Before The Court**

During the aggravation and mitigation hearing, Macks displayed a demeanor disrespectful to the Court and counsel. (R. 239, 264-265, 268, 271, 278-279, 282, 400A, 401.) Judge Novoselsky repeatedly admonished Macks for the nature of his responses to questions of counsel. (R. 264-265, 268, 271, 278-179, 282, 400A.) Even in response to a question from *his own counsel* regarding where Macks had grown up, Macks testified that he had still not grown up. (R. 239.)

Previously, Macks had been warned by Judge Budzinski numerous times for his improper remarks during the citation proceedings. (R. 299, 301, 306, 492, 504, 522, 523.) Judge Budzinski repeatedly asked counsel for Macks to admonish his client. (R. 299, 504, 522.) At one point Macks, while on the witness stand, called one of the attorneys for Wernick a "schmuck." (R. 305-306.) When Judge Budzinski admonished him, Macks responded "You mean I can't use lip movement." (R. 306) At another point, the following occurred:

THE WITNESS: Judge —

THE COURT: You have to answer.

MR: HERZOG: Just answer the question.
(Attorney for Macks)

THE COURT: You have to answer.

THE WITNESS: Would I be in contempt if I did something physical?

MR. HERZOG: Just answer the question.

THE COURT: You would be in contempt talking that way. Answer the question.

THE WITNESS: No.

(R. 622.)

**The Contempt Sanctions**

Judge Novoselsky observed that Macks is an individual who has no regard or respect for rules of court or attorney conduct. (R. 401.) Judge Novoselsky stated:

> In deciding what sanctions should be levied . . . the Court would have to evaluate the conduct of Mitchell Macks before this court during the hearings on aggravation and mitigation as well as the evidence admitted in [the] hearing on the rule to show cause.
>
> For this Court to believe that Mr. Macks feels remorse for his actions in violating the specific admonitions and rules previously stated, his conduct on the witness stand is of importance to this trier of facts.
>
> On numerous occasions in Mr. Macks' testimony as a witness before this court, the court had to admonish him for his behavior in his response to questions, and questioning by Counsel. This court observed his demeanor and his conduct before this court, and weighing it against the testimony of Rabbi Novick, and Rabbi Kroll [Macks' son-in-law and Judge Novoselsky's rabbi], and Mr. Harry Abrams, it seems as if the witnesses testifying in mitigation were discussing another individual, not the individual on trial.
>
> He may be a charitable, loving father, a pillar of his synagogue, but [he is] also an individual who has no regard or respect for rules of the court or attorneys' conduct. [He] may not have been an active . . . practitioner of the law but he is not a novice to court appearances or procedures.

(R. 400-401.)

On June 19, 1987, Judge Novoselsky ordered Macks to pay $500 into the Court's registry; to serve 50 hours of community service to a charitable organization; and to pay reasonable attorney fees related to the contempt proceeding. (C. 108-109, R. 401, Pet. App. D.)

### Post-Trial And Appellate Proceedings

On July 15, 1987, Macks filed a post-trial motion asking the court to vacate the contempt finding and dismiss the charge, or in the alternative grant a new trial. (C. 111-113.) After a full hearing on Macks' post-trial motion (R. 406-444), the motion was denied on August 11, 1987. (C. 116, R. 446-460, Pet. App. E.) Macks appealed, and the Illinois Appellate Court affirmed the contempt finding and sanction. *In Re Estate of Wernick,* 176 Ill. App. 3d 153, 530 N.E.2d 1127 (1st Dist. 1988). Macks' petition to the Illinois Supreme Court for leave to appeal was denied. 124 Ill. 2d 555, 535 N.E.2d 922 (1989).

## REASONS FOR DENYING THE WRIT

## THE CONTEMPT PROCEEDING WAS PROPERLY CONDUCTED IN ACCORDANCE WITH ILLINOIS LAW AND MACKS WAS NOT DEPRIVED OF ANY PROCEDURAL SAFEGUARD TO WHICH HE WAS ENTITLED

### A. The Contempt Proceeding Was Properly Conducted

#### 1. The Circuit Court of Cook County *Ex Parte* Communications Rule

Macks was found in contempt for repeatedly engaging Judge Budzinski in *ex parte* communications, despite having been admonished by the judge not to do so, and in violation of the Court's *ex parte* communications rule.

Circuit Court of Cook County Rule 17 prohibiting *ex parte* communications was adopted by that Court under the cloud of "Operation Greylord", a federal investigation into corruption in that County's judicial system that led to the indictment and conviction of a number of judges and lawyers. Rule 17 is an attempt to protect the judiciary from lawyers and parties who would engage in *ex parte* communications, and to restore both

integrity and the appearance of integrity to the Cook County judicial system.[3]

Professor Lousin, who served at the appointment of the Administrative Office of the Illinois Courts as Reporter for the Judicial Ethics Committee of the 1987 Associate Judges Seminar, has written:

> The recent Greylord investigation has uncovered not only bribery, but also what most citizens of Illinois already knew: there are lawyers and litigants who virtually try to camp in a judge's chambers. The problem of *ex parte* communications, especially those clearly designed to influence the judge's rulings in a case he is currently hearing, is most acute in Chicago, but it is known in other parts of Illinois, too.

Lousin, *The New Ex Parte Communications Rule in Illinois: A Step Forward?* 19 *Loy. U. Chi. L.J.* 1031 (1988).

### 2. Illinois Courts Approve of Contempt "Prosecution" By Counsel For A Litigant

Counsel for Wernick followed a long tradition of established Illinois precedent in "prosecuting" Macks for contempt. In Illinois, an indirect criminal contempt may be "prosecuted" by counsel for a litigant or by an *amicus curiae* appointed by the court as well as by the state's attorney. *Marcisz v. Marcisz,* 65 Ill. 2d 206, 210, 357 N.E.2d 477, 479 (1976), following *People v. Goss,* 10 Ill. 2d 533, 14 N.E.2d 385 (1957); *47th & State Currency, Etc. v. B. Coleman Corp.,* 56 Ill. App. 3d 229, 235, 371 N.E.2d

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[3] Effective January 1, 1987, the Illinois Supreme Court adopted a similar rule, Rule 63(A) (4) of the 1987 Illinois Code of Judicial Conduct, which provides as follows:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, a full right to be heard according to law, and, except as authorized by law, shall not permit *ex parte* or other communications concerning a pending or impending proceeding.

The Committee Commentary makes it clear that the drafters used ABA Model Canon 3(A) (4) as their starting point. Ill. S. Ct. R. 63, *Ill. Ann. Stat.* ch. 110A, para. 63 (Smith-Hurd Supp. 1987) (Committee Commentary to Rule 63).

294, 299 n.3 (1st Dist. 1977). *See also* Burr, *The Law of Contempt in Illinois,* 19 *Loy. U. Chi. L.J.* 827, 832 (1988).

In a leading Illinois case in which the defendants were found in contempt, fined $5,000 and assessed $45,555 in attorney fees for violating an injunction against violation of a covenant not to compete, the same law firm (Winston & Strawn) now representing Macks on his petition for certiorari "prosecuted" the criminal contempt and was awarded the attorney fees. *Frank B. Hall & Co., Inc. v Payseur,* 99 Ill. App. 3d 857, 425 N.E.2d 1002 (1st Dist. 1981). In that case, the reviewing court applauded counsel who "prosecuted" the contempt, stating that "[t]he private litigant who brings the fact of an indirect contempt, civil or criminal in nature, before the court, performs a valuable service to the court." 99 Ill. App. 3d at 862, 425 N.E.2d at 1006. It was in accordance with this line of Illinois precedent that Wernick's counsel moved for a rule to show cause and, once that motion was granted, acted as the proponent in the contempt hearing.

### 3. Macks Received A Fair Hearing

The Illinois Appellate Court reviewed Macks' contention that he was deprived of due process because opposing counsel in the underlying probate proceeding "prosecuted" the contempt proceeding, and stated:

> In Illinois, indirect criminal contempt proceedings may be instigated by private counsel. (citation omitted). By labelling opposing counsel "prosecutors", Macks raised issues both inapplicable in the instant case *and altogether absent:* the appearance of unfairness, possible misrepresentation of facts, and the difficulty of having a "prosecutor" with a proprietary interest in the outcome of the contempt hearing.
>
> * * *
>
> *[t]he hearing, being on a motion by the opposing [party] in the underlying case, was properly conducted by [the opposing party's] counsel.* Further, Macks enjoyed every due process safeguard.

*In Re Estate of Wernick,* 176 Ill. App. 3d at 158-160, Pet. App. at A-5 - A-7 (emphasis added).

The record of the contempt proceeding demonstrates that Macks was afforded every procedural right available to him and more. An impartial judge presided over the contempt proceeding. (On *Wernick's,* not Macks', motion, Judge Budzinski, whom Macks had engaged in the *ex parte* communications, recused himself and the chief judge of the Probate Division presided over the contempt proceeding.) Macks was vigorously represented by counsel at all stages of the contempt proceeding.

An entire year was devoted to the contempt proceeding. Even prior to the issuance of the Rule to Show Cause, Macks was allowed to challenge the Motion for Rule to Show Cause, via a Motion to Strike and Dismiss which was heard and ruled upon. Macks next challenged the Rule to Show Cause upon its issuance, which was amended. Thereafter, in response to Macks' further challenges, the court ordered further changes to the Amended Rule to Show Cause. Macks next had an opportunity to file an answer, which he did, and a full hearing was conducted at which Macks availed himself of his Fifth Amendment right.[4] Before a sanction was imposed on the contempt finding, an aggravation and mitigation hearing was conducted at which Macks chose to testify and call witnesses.

Due process was clearly afforded to Macks. The Illinois Appellate Court, after reviewing the record, observed that Macks "was afforded every safeguard of due process" and concluded that "Macks can make no tenable argument that he was deprived of due process." 176 Ill. App. 3d at 158, Pet. App. at A-5. The appellate court catalogued some of those due process safeguards:

> Macks had timely and sufficient notice of the proceeding. He was afforded a hearing on the merits of the

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[4] At no time prior to the entry of the contempt finding did Macks raise any challenge to Wernick's counsel as the "prosecutor" of the contempt charge. Macks first raised the issue of the "interested prosecutor" a month after the contempt hearing and the entry of the contempt finding, in a post-trial motion filed during the aggravation and mitigation hearing concerning the sanction to be imposed. In Illinois, when an issue is first raised in a post-trial motion, the reviewing court need only determine whether the trial court abused its discretion in denying the motion. The Illinois Appellate Court held that there was no abuse of discretion. 176 Ill. App. 3d at 158, Pet. App. at A-5.

> issue before an impartial judge. He was given a second hearing on aggravation and mitigation. He enjoyed adequate and able representation at both hearings. He enjoyed the privilege against self-incrimination. All these safeguards were provided before any deprivation of liberty or property.

176 Ill. App. 3d at 158, Pet. App. at A-5.

#### 4. There Is No Due Process Right To A Disinterested Prosecutor In State Court Petty Contempt Proceedings

There was *never* any suggestion that Macks should be imprisoned for his conduct. In deference to Macks' age, "prosecuting" counsel specifically requested that the court not consider imprisonment. (R. 371.) This is not the "overzealous prosecutor" Macks now attempts to portray to this Court. The purpose of bringing the Motion for Rule To Show Cause was stated by Wernick's counsel in his closing remarks:

> . . . we have to go on litigating this case against Mr. Macks . . .we want to know that he will not violate court rules, that he will follow the orders of court, that he will conduct himself as a professional, a member of our profession.

(R. 371-372.)

As set forth above, Macks cannot in good faith contend that he did not receive a fair hearing. Nor can Macks point to any actual prejudice arising from the conduct of Wernick's counsel. Macks therefore contends that the "prosecution" of a state court petty contempt by counsel for the contemnor's opponent in underlying civil litigation is a *per se* due process violation.

Criminal contempt proceedings have a quasi-criminal nature to which the due process guarantee of fundamental fairness, rather than the provisions of the Bill of Rights apply. *United States v. Bukowski,* 435 F.2d 1094, 1101 (7th Cir. 1970), *cert. denied,* 401 U.S. 911 (1971). This Court has recognized that "criminal contempt is a petty offense unless the punishment makes it a serious one." *Bloom v. Illinois,* 391 U.S. 194, 198 (1968). Because Macks was not sentenced to imprisonment in this case

and imprisonment was not requested, this is not a serious criminal contempt as was the case in *Bloom v. Illinois*. While this Court has mandated that certain procedural protections are available to criminal contemnors, this Court has never recognized a due process right to a disinterested prosecutor in state court petty contempt proceedings. The Due Process Clause of the Fourteenth Amendment does not require that states discontinue the long-established practice of permitting petty contempts to be "prosecuted" by opposing counsel in civil litigation.

### 5. The Cases Cited By Macks Are Readily Distinguishable

Macks' reliance on *Marshall v. Jerrico*, 446 U.S. 238 (1980) is to no avail. The "neutrality in adjudicative proceedings" discussed in that case relates to the need for an impartial *judiciary*. Indeed, the Court in *Marshall* observed that the strict requirements of neutrality are not the same for a prosecutor as they are for a judge. 446 U.S. at 248-250. Here, Wernick, Macks' opponent, moved for the recusal of Judge Budzinski and the contempt proceeding was heard by Judge Novoselsky to insure that the requirement of a neutral and impartial judiciary was met.

In *Carey v. Piphus*, 435 U.S. 247 (1978), the plaintiff students were suspended from school without a hearing. Macks was afforded a full hearing. In *Joint-Anti Fascist Comm. v. McGrath*, 341 U.S. 123 (1951), certain organizations were labeled as communist by the United States Attorney General without notice or hearing, and in *Mathews v. Eldrige*, 424 U.S. 319 (1976), this Court held that an evidentiary hearing was *not* required prior to the denial of disability benefits. These cases cited by Macks have no application here.

Equally inapplicable are the cases cited by Macks regarding prosecutorial misconduct. *Brady v. Maryland*, 373 U.S. 83 (1963) and *Alcotra v. Texas*, 355 U.S. 28 (1957) involved suppression of exculpatory evidence. In *Giglio v. United States*, 405 U.S. 150 (1972) and *Miller v. Pate*, 386 U.S. 1 (1967), the "prosecution" allowed its entire case to stand on false evidence. *Heckler v. Chaney*, 470 U.S. 821 (1985), dealt with the issue of judicial review of administrative agency discretionary actions, not prosecutorial misconduct, and is simply not on point.

Nor was Wernick's counsel an "interested prosecutor" in the sense of *Brotherhood of Locomotive Firemen and Enginemen v. United States*, 411 F.2d 312 (5th Cir. 1969), cited by Macks. The due process violations found in *Brotherhood* primarily related to inadequate notice and the manner in which the hearings were conducted. In holding the notice inadequate, the court in *Brotherhood* emphasized the uncertainty as to what was charged and the difficulty and delay in obtaining counsel, factors not present here. Moreover, in vacating the contempt finding in *Brotherhood of Locomotive Firemen,* the court took note of the fact that the original injunction was later invalidated as having been erroneously entered. *Id.* at 320.

Macks' reliance on *Young v. Vuitton,* 481 U.S. 787 (1987) is also to no avail. *Young v. Vuitton* concerned the federal district court's authority to appoint a private attorney to prosecute a criminal contempt under Fed. R. Crim. P. 42 (b). This is unlike the contempt proceeding against Macks, which involved neither the judicial appointment of a special prosecutor nor the court's inherent power to make such an appointment. The case at issue here "simply concerns the routine [state] practice of bringing contempts to the attention of the court by motion." *Sassower v. Sheriff of Westchester County,* 824 F.2d 184, 191 (2d Cir. 1987), distinguishing *Young v. Vuitton.*[5]

*Young v. Vuitton* does not recognize a due process right to a disinterested prosecutor in state court contempt proceedings.[6] This Court's plurality decision in *Young v. Vuitton* was not meant to apply to state court petty contempt proceedings for violations of state court procedural rules. The acts of Wernick's counsel in "initiating" the contempt proceeding by filing a Motion for Rule To Show Cause and in serving as proponent at the contempt hearing after the impartial judge determined to issue the Rule

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[5] *Sassower* involved a contemnor who, like Macks, was an attorney, and who persistently presented meritless claims, and after being convicted of criminal contempt appealed on due process grounds.

[6] Only Justice Blackmun thought that a constitutional question was raised. *Young v. Vuitton,* 481 U.S. at 814-815 (Blackmun, J. concurring).

to Show Cause are simply not analogous to the acts of the court-appointed special prosecutor in *Young v. Vuitton*. (*Young v. Vuitton* is discussed in more detail *infra*.)

## B. "Prosecution" By Wernick's Counsel Did Not Prejudice Macks

### 1. The Broad Question Macks Presents for Review

Macks would have this Court hold that it is a *per se* due process violation for the states to permit prosecution of petty criminal contempts by private counsel who represent a party interested in the outcome. Such a holding would be tantamount to a prohibition of private prosecution of most petty criminal offenses in the state courts, for it is doubtful that anybody but an interested party would take the trouble to prosecute most petty offenses.

In *Bloom v. Illinois*, the Court reasoned that "serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States, and that the traditional rule [not affording jury trials in contempt proceedings] is constitutionally infirm insofar as it permits *other than petty contempts* to be tried without honoring a demand for a jury trial." 391 U.S. at 198 (emphasis added). The Court in *Bloom v. Illinois* deliberately declined to extend the right to jury trial to petty contempts, just as the Court in *Duncan v. Louisiana*, 391 U.S. 145, 159-162 (1968) on the same day retained the rule that petty crimes need not be tried to a jury. *See Bloom v. Illinois*, 391 U.S. at 210.

Macks would have this Court not only recognize a due process right to a disinterested prosecutor, but extend it to the states for serious as well as petty criminal offenses. "To take this course . . . would be not only unnecessary but mischievous because it would inflict a serious blow upon the principle of federalism." *Bloom v. Illinois*, 391 U.S. at 213-214. The course Macks espouses

would wreak havoc upon established state court practice and render the state courts incapable of upholding their dignity, enforcing their rules or even their ministerial orders.

### 2. The Tradition of Private Prosecution In The State Courts

> The Due Process Clause commands us to apply its great standard to state court proceedings to assure basic fairness. It does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 States. . . [i]n our insistence upon State observance of due process, we should, so far as possible, allow the greatest latitude for state differences. [The Constitution] requires, within the limits of the lofty basic standards that it prescribes for the States as well as the Federal Government, maximum opportunity for diversity and minimal imposition of uniformity of method and detail upon the States. Our Constitution sets up a federal union, not a monolith.

*Bloom v. Illinois,* 391 U.S. at 213-214.

As discussed *supra,* it is well-established in Illinois that counsel for an opposing party may prosecute a contempt. This is but one aspect of an extensive role in criminal law enforcement played by private prosecutors in the states. A study conducted by *Yale Law Journal* disclosed that in 30 jurisdictions appellate courts have decided that privately employed attorneys may assist the public prosecutor, while only 3 have said they may not. Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction,* 65 *Yale L.J.* 209, 218-219 (1955) (hereinafter cited as *"Private Prosecution"* or *"Yale Law Journal"*). Illinois is one of the states that approve of such a role for private prosecutors. *Hayner v. People,* 213 Ill. 142, 72 N.E. 792 (1904).

Most states find authority for permitting private prosecution in the inherent power of the court to administer justice, while a few states have enacted statutes that give private parties the right to hire assistant prosecutors. *Private Prosecution* at 219.

Many states permit privately hired counsel to conduct criminal prosecutions alone with the permission of the public prosecutor and the trial court. *Id.* at 220.

### 3. The Need For Private Prosecution In State Court Petty Contempt Proceedings

Rather than dwelling on theoretical conflicts of interest in the private prosecutorial role, the *Yale Law Journal* was concerned with the actual failings and excesses of *public* prosecutors, pointing out that "[t]he decision not to prosecute can be implemented by mere inaction, acceptance of a compromise plea, or entry of a *nolle prosequi*." *Private Prosecution* at 209-210. The *Yale Law Journal* observed that "corruption, political ambition, or insufficiency of funds and personnel often motivate district attorneys to use these techniques to excess" and that "[s]uch abuse of the district attorney's discretion has created a substantial deficiency in criminal law enforcement." *Id.* at 210.

Over 25% of 151 public prosecutors from 45 states who responded to the *Yale Law Journal* questionnaire on prosecution procedures stated that they did not have enough time or help to conduct necessary prosecutions. *Private Prosecution* at 210 n.8. As of 1984, roughly 20,000 felony charges were being brought against individuals in Cook County every year. The Cook County State's Attorney's Office is responsible for review and prosecution of these felonies, and is also responsible for some 500,000 misdemeanors annually in the City of Chicago as well as misdemeanors committed in suburban Cook County (the Chicago Metropolitan Area). The State's Attorney's Office also acts as attorney for the Cook County Board and for all the various branches of county government. 1984 *Report of the Circuit Court of Cook County, Illinois* at 47.

During 1987, in the Municipal Department of the Circuit Court of Cook County, a total of 363,479 misdemeanors, ordinance and other petty violations were charged. Of these, 302,946 (83%) were disposed of without convictions (73% being dismissed for want of prosecution, nol-prossed, non-suited, stricken-off with leave to reinstate [similar to *nolle prosequi* in Cook County],

or discharged under the speedy trial statute), while only 60,533 (17%) resulted in conviction. Administrative Office of the Illinois Courts, 1987 *Annual Report to the Supreme Court of Illinois* at 242.

Faced with these numbing statistics concerning the disposition of petty offenses, it is unrealistic to assume that the Cook County State's Attorney would be able to meaningfully aide the Circuit Court of Cook County in enforcing its *ex parte* communications rule, not to mention its other rules and ministerial orders (such as those relating to court procedures, discovery in the conduct of litigation, etc.). Unless private counsel can "prosecute" contempts in the Cook County court system, the court will be unable to enforce its rules or orders. "The ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of self-protection, without which courts would be 'mere boards of arbitration whose judgments and decrees would be only advisory'. " *Young v. Vuitton,* 481 U.S. at 796, quoting *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 450 (1911).

### 4. Macks Has Failed to Demonstrate Any Actual Prejudice

Macks recognizes that he can show no actual prejudice by virtue of the "prosecution" of the contempt charge by Wernick's counsel:

> Even *in the absence of any objective evidence of an attempt to use the criminal proceedings to gain an advantage in the civil proceedings or an impairment of judgment based on conflicting duties,* the situation is so inherently coercive that, at a minimum, it creates an appearance of unfairness and impropriety.

Pet. at 10 (emphasis added). In other words, there was no attempt by Wernick to gain any advantage in the civil proceeding by reason of the contempt proceeding, nor is there any indication that Wernick's counsel acted improperly in the contempt proceeding.

In reviewing Macks' contention that a conflict of interest arose in "prosecution" of Macks by an "interested prosecutor"

(which Macks raised for the first time in his post-trial motion), the trial court ruled that the conflicts which "were inherent in the fact structure" of *Young v. Vuitton* "do not exist in the instant case." The trial court analyzed each of those in the context of this case, as follows:

| *Young v. Vuitton* | *This Case* |
| --- | --- |
| In Young, the beneficiary of the court order prohibiting the trademark infringement was the party whose attorneys were appointed special prosecutor in the contempt action. Therefore, that party stood to gain significant financial and legal rewards by possibly bringing a tenuously supported prosecution. Indeed, the action would prevent further infringement resulting in increased profits to the party. | The result is not the same in the instant case. Here, the beneficiary of any contempt action is the court and not the private party. There are no injunctive orders beneficial to [Wernick] that are alleged to have been violated. Thus, [Wernick] does not stand to gain any financial or legal reward by prosecuting the contempt action. |
| In Young, the court was also concerned that the special prosecutor might abandon his quest to vindicate the court's authority if a fruitful settlement were proposed by the opposite party. The court argued that the prosecutor might decide to recommend that no charges be brought against the alleged contemnors if they would agree to a special prosecutor's settlement demands. In essence, the court was concerned that the special prosecutor would use the contempt proceeding as a bargaining chip. | There is simply no proof that the attorney for [Wernick] here will not vigorously attempt to vindicate the court's authority . . . This is of no concern to the court in the present case. |

In Young, the alleged contumacious conduct was still under investigation giving the special prosecutor the bargaining chips he needed to demand the certain rewarding fruits.

In this case the investigation was complete and a Rule to Show Cause was granted. Since the Judge could have summarily punished [Macks] in his discretion, [Wernick] could not use the contempt action to his advantage. Any attempt to abandon the prosecution by [Wernick] would have resulted in the court attempting to vindicate its own authority. Therefore, [Wernick] does not stand in the same [position] to gain rewarding fruits by abandoning the prosecution of [Macks].

Finally, the court in *Young* was concerned that the special prosecutor might use the contempt action in order to gain material information in that case as well as information about a defamation action filed by petitioner against special prosecutor.

While there may have been information to be gleaned from the prosecution of the contempt action in Young, such is not the case here. The substance of [Macks'] *ex parte* communications with the Judge in the instant case was revealed in open court and while it related to the underlying probate proceeding, the information was not material. Therefore, [Wernick's counsel] were in no position to gain information beneficial to their client's interest.

Pet. App. at E-5 - E-6.

The Illinois Appellate Court also reviewed the record in light of *Young v. Vuitton* and Macks' contention that a conflict of interest arose in the "prosecution" of Macks by an "interested prosecutor", and held that "no conflict of interest arose" and that the contempt hearing "was properly conducted by [opposing]

counsel." 176 Ill. App. 3d at 159-160, Pet. App. at A-6, A-7.[7]

Even those commentators who have warned against potential conflicts of interest where a private attorney serves as prosecutor (and vice versa) have acknowledged that there is less possibility of unfairness to the defendant arising from the attorney's in-court activity than from his participation in the stages of a prosecution in which the prosecutor has greater discretionary power (i.e. investigation, determination whether to charge, grand jury, plea bargaining, etc.). This is because the

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[7] Macks' insinuation that Wernick's counsel violated ABA Model Code and Illinois Code of Professional Responsibility Rule 7-105 is without merit. Pet. at 10. Rule 7-105, which prohibits an attorney from threatening unwarranted criminal charges to obtain an advantage in a civil matter, do not apply to a situation where one party petitions the court to enforce a procedural rule by means of appropriate sanctions. 176 Ill. App. 3d at 159, Pet. App. at A-6. Asking the court to exercise its contempt power is *not* a threat of criminal prosecution to obtain advantage in a civil matter and clearly does not violate Rule 7-105.

Macks' assertion that his prosecution was in contravention of *Ill. Rev. Stat.* ch. 14, §6 (1987) is similarly without merit. Pet. at 9 n. That statute provides:

> Whenever the attorney general or state's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the attorney general or state's attorney would have had if present and attending to the same . . .

The statute clearly is inapplicable. Unlike *Sommer v. Goetze,* 102 Ill. App. 3d 117, 429 N.E.2d 901 (3rd. Dist. 1981) and *Gilbert v. People,* 121 Ill. App. 423 (3rd Dist. 1905), cited by Macks, this contempt proceeding did not involve or require the involvement of the attorney general or state's attorney. Moreover, Wernick's counsel was not appointed by the court as special prosecutor, but was proceeding under established precedent as counsel for a private litigant.

attorney's in-court actions are subject to closer judicial and public scrutiny.[8]

In the contempt proceeding against Macks, counsel for Wernick brought a Motion for Rule To Show Cause, but the impartial judge decided to *issue* the Rule to Show Cause. Thus, the impartial judge made the determination whether to prosecute the contempt and supervised the contempt proceeding. No prosecutorial discretion was vested in Wernick's counsel, who merely acted as the proponent at the contempt hearing.

### C. *Young v. Vuitton* Does Not Apply To This Case

As discussed above, *Young v. Vuitton* was carefully considered by the trial court and the appellate court below, and they correctly concluded that it did not apply to this case. In *Young v. Vuitton,* the Court exercised its supervisory power over contempt prosecutions *in federal courts* in holding that counsel for a party who is the beneficiary of a court order cannot be appointed to prosecute a contempt action alleging a violation of that order. 481 U.S. 808-809. Macks relies upon *Young v. Vuitton* in petitioning this Court for certiorari based on a purported violation of his Fifth and Fourteenth Amendment rights, but *Young v. Vuitton* was not decided on constitutional grounds, and does not apply to the state.

Numerous other distinctions between this case and *Young v. Vuitton* have already been discussed. Fundamentally, as the Illinois Appellate Court observed, in *Young v. Vuitton* "winning the contempt order meant enforcement of the injunction, through extraordinary means, to the direct benefit of the party seeking

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[8] *See* Comment, *The Outmoded Concept of Private Prosecution,* 25 *Am. U.L. Rev.* 754, 773-774 (1976). ("If the private prosecutor's participation in the case is limited to in-court activity, there is little chance of prejudice resulting to the defendant, because the former's conduct is visible and governed by the same standards as is that of the regular prosecutor.") *Id.* at 791. *See also* Note, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure,* 54 *Fordham L. Rev.* 1141 (1986) ("The actual trial, because it is conducted before a judge, may be subject to less prosecutorial abuse.") *Id.* at 1159 n. 68.

the contempt." 176 Ill. App. 3d at 159, Pet. App. at A-6. Macks was found in contempt for violating a court rule and admonition, not a prior court order that benefited his opponent. The conduct for which Macks was found in contempt did not arise from a violation of a court order in which Wernick or his counsel had a proprietary interest. Wernick stood to benefit, if at all, only indirectly, as all honorable litigants benefit when the dignity of the court is upheld. As the trial court concluded, "the beneficiary of [this] contempt action is the court and not the private party." Pet. App. E-3.

In *Young v. Vuitton,* the Court was clearly troubled by the undercover "sting" operation carried out by the special prosecutor, in which more than 100 audio and video tapes were made of meetings and telephone conversations totally outside the supervision of the United States Attorney's office. *Young v. Vuitton,* 481 U.S. at 792. Also troubling was the fact that the consent decree in *Young v. Vuitton* contained a liquidated damages provision of $750,000 for violation of the injunction. As the Court observed, "[T]he prospect of such a damage award had the potential to influence whether Young was selected as a target of the investigation, whether he might be offered a plea bargain, or whether he might be offered immunity in return for his testimony." *Young v. Vuitton,* 481 U.S. at 805-806. The Court in *Young v. Vuitton* was further troubled by the fact that one of the special prosecutors was himself a defendant in a defamation action filed by one of the defendants in the underlying civil case whom he prosecuted for contempt. Thus, not only the party represented by the special prosecutor, but the *special prosecutor himself* had a direct interest. As the Court observed, "[t]his created the possibility that the investigation . . . might be shaped in part by a desire to obtain information useful in the defense of the defamation suit." *Young v. Vuitton,* 481 U.S. at 806.

In this case, the Illinois Appellate Court reviewed the record and concluded that "[t]he record categorically shows that Macks engaged in an *ex parte* communication . . . ," that "[t]he evidence amply supports the finding of contempt . . . ," that the evidence in the contempt hearing "clearly met" the reasonable doubt standard, that the contempt ruling "was based on substantial

evidence, . . ." that "Macks' behavior demonstrated, if not epitomized, the extreme circumstances in which a contempt finding is warranted . . . ," that Macks "was found guilty of contempt by overwhelming evidence . . . ," and that the contempt hearing "was properly conducted" by opposing counsel. 176 Ill. App. 3d at 157-160, Pet. App. at A-4 - A-7.

The conflicts of interest present in *Young v. Vuitton* are not present in this case. The contempt finding in this case is clearly supported by the evidence. Macks not only has failed to demonstrate actual prejudice, he has essentially conceded there was none.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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